Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Provision of Directory Listing Information	)	
Under the Telecommunications Act of 1934,	)	CC Docket No. 99-273
As Amended	)	
	)	
TO: The Commission	)	

COMMENTS OF INFONXX, INC.

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SUMMARY

This proceeding presents the Commission with the unusual opportunity to promote competition in both the directory assistance and local telephone exchange markets. The Commission recognized in its recent decision on unbundled network elements (the *UNE Decision*) that directory assistance (DA) services are an important component of local telephone service. The Commission nonetheless concluded that such services need not be offered by local incumbents on an unbundled basis because sufficient competition had developed to permit competing carriers to provide their own DA services or to obtain them from independent third-party providers. What the Commission failed to recognize in that proceeding, but which it must take into account here, is that the ability of independent DA providers to fill the role contemplated for them in the *UNE Decision* – providing a viable competitive alternative to the incumbent's DA service – depends on the independent providers' having access to the subscriber list information (SLI) controlled by the ILECs at rates and terms that enable the independent providers to compete with both the incumbents and other carriers providing directory assistance services. Absent the adoption of rules requiring nondiscriminatory access to LECs' directory listing information at competitive rates, LECs will continue to forestall competition in the DA market; consumers will be deprived of better prices and improved DA services; and competitive LECs will find it harder to provide the full range of high-quality, competitively-priced local exchange services.

To ensure that independent DA providers have access to the directory information they need to provide quality service at competitive prices, the Commission should require LECs to provide independent DA providers with nondiscriminatory access to directory assistance databases under Section 251(b)(3) of the Communications Act. The Commission should take the

opportunity in this proceeding to rule that independent DA providers are entitled to nondiscriminatory access to subscriber list information under Section 251(b)(3) to the extent that they provide telephone exchange and telephone toll service through "call completion" and/or are the agents of providers of telephone exchange and telephone toll service. The Commission also should determine that all DA providers are entitled to nondiscriminatory access at incremental cost-based rates pursuant to the nondiscrimination and "just and reasonable" requirements of Sections 201(b) and 202(a) of the Act. Absent such a rule, independent DA providers will face unfair discrimination in obtaining SLI and will be unable to compete effectively in the market for DA services.

The Commission also should require LECs to provide SLI to competitive DA providers under Section 222(e) because competitive DA providers seek access to SLI for purposes of "publishing" the information through live operators. However, the Commission should make clear that the nondiscriminatory and reasonable rates and terms at which SLI must be provided to competitive DA providers are not the "presumptively reasonable" rates applicable to publishers of print directories, but rather the rates at which such information is provided to those with whom independent DA providers compete, including carriers who gain access to SLI under Section 251(b)(3).

Finally, the Commission should ensure that nondiscriminatory access means that independent DA providers obtain subscriber list information at rates and terms equivalent to those at which other competitors in the DA market, including LECs, IXCs and other carriers, receive the information. Consistent with this principle, the Commission should adopt a requirement under Section 251(b)(3) that LECs offering national directory assistance services to local subscribers must provide competing DA providers (whether they are other carriers or

independent DA providers) with access to *all* the directory information used by their operators in the provision of directory assistance services.

INFONXX, Inc. urges the Commission to take these necessary steps expeditiously to ensure that consumers receive the full benefits of competition in both the directory assistance market and the local telephone exchange market.

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COMMENTS OF INFONXX, INC.

In its recent decision on unbundled network elements (the *UNE Decision*), the Commission determined that unbundled access to directory assistance (DA) services is no longer mandated under Section 251(c)(3) because the market for such services has developed sufficiently for competitors either to self-provision DA or to acquire it from alternative sources.[1] Thus, the Commission has declared its intent to rely on the market, including independent DA providers, to provide directory assistance services to competitive local exchange carriers (CLECs) and other competitors of incumbent local exchange carriers (ILECs). Some may argue in the UNE proceeding that the Commission's decision to remove DA services from the UNE list is premature because the DA market remains highly concentrated, with competitors controlling only about 3% of the market. Of course, that question is not at issue in this proceeding. However, the *UNE Decision* heightens the importance of the issue that is at stake here: whether the independent DA providers that the Commission is now relying on to deliver DA services to CLECs and other carriers will have nondiscriminatory access to subscriber list information at cost-based prices such that they can offer DA service at competitive rates.

[1] "FCC Promotes Local Telecommunications Competition," News Release, Report No. CC 99-41, at 2 (Sept. 15, 1999).

The vision contemplated by the *UNE Decision*, that of competitive DA providers serving CLECs and other carriers (essentially as "carrier's carriers"), clearly is in the public interest. However, the Commission will not foster that vision unless it promulgates, in this proceeding, the necessary rules to permit independent providers to gain access on reasonable terms to the subscriber list information (SLI) that ILECs control. In much the same way that competition in the long distance market did not take off until carrier's carriers emerged to help give competing carriers access to the full range of facilities and services offered by dominant providers,[2] so too will consumers and competing carriers not fully realize the benefits of local telephone competition unless competitive DA providers are able to supply the necessary DA component of local phone service.

INFONXX, Inc. (INFONXX), by its attorneys, submits these comments in response to the *Notice of Proposed Rulemaking* (*Notice*) in this proceeding[3] to urge the Commission to establish clear rules that will ensure that independent DA providers have nondiscriminatory access to the key subscriber list information they need to provide a viable competitive service that will compete directly with ILECs' DA services and will enhance the ability of CLECs to offer competitive local services. These rules are necessary, since the promise of competition sometimes goes unfulfilled because independent DA providers such as INFONXX suffer inherent and substantial disadvantages in the market. The uneven playing field

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[2] Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, FCC 95-427, 11 FCC Rcd 3271, 3305 (1995) (concluding that resellers, who purchase interexchange capacity from a "carrier's carrier," exerted significant competitive pressure on incumbent providers, evidenced by their control of 17.3% of interstate interexchange revenues).

[3] The caption of this proceeding refers to the "Telecommunications Act of 1934, As Amended." We assume that the Commission meant to refer to the "Communications Act of 1934, As Amended," since the *Notice* discusses Sections 222 and 251 (as added by the Telecommunications Act of 1996) and Sections 201-202 of the Communications Act of 1934.

has forced some fledgling DA providers out of the market and places other companies at risk. INFONXX urges the Commission to act expeditiously in this proceeding to remedy these inequities by ensuring that competitive DA providers have timely access to accurate directory information at prices comparable to those paid by other providers of DA services.

INTRODUCTION

The notion that one could obtain directory assistance for a better price and at a higher service quality than that offered by the Bell companies and other ILECs was a foreign concept in 1992, when INFONXX opened for business with five employees – the two founders and three telephone operators. But the company had an insight that directory assistance – like customer premises equipment, long distance, and local exchange – could be provided by an alternative to the incumbent monopoly. INFONXX was the first company to challenge an incumbent provider in this market, and many retail customers, mostly large businesses, welcomed the opportunity to switch to an alternative provider who could deliver DA services at higher quality and better prices. More recently, INFONXX has become a "carrier's carrier" for directory assistance, providing DA services to a wide array of cellular carriers, including Airtouch and Bell Atlantic Mobile, as well as to CLECs such as Teleport. Today, INFONXX has a thousand employees, operates four call centers, handles 75-100 million calls per year and provides service in twenty-seven major markets around the country.

The emergence of competition in the directory assistance market has served the public interest by driving down the prices charged for some directory assistance services and by providing new and better DA services to the public.[4] However, the ability of INFONXX and

[4] In competing directly with INFONXX to provide DA services to other carriers, some ILECs have offered to provide directory assistance at prices well below those they ordinarily charge.
(continued…)

others to remain a force in the market is hindered by the anticompetitive tactics of the ILECs, who exercise monopoly control over the information essential to the provision of DA services. To date, INFONXX and other competitive DA companies have grown despite constantly fighting an uphill battle against the ILECs. The battle lines are clear: the ILECs, by virtue of their position as the dominant providers of local exchange service, maintain and control the raw material essential to the DA business – a complete and fully accurate database of subscriber listing information. The ILECs exploit this control by refusing to share their directory assistance information with competitive DA providers or by charging exorbitant prices for access to the information. Meanwhile, AT&T, MCI WorldCom and other CLECs/IXCs obtain access to the directory information under Section 251 and provide their own DA services, increasing the field of competitors with an unfair advantage over independent DA providers.

Despite INFONXX's inferior access to subscriber listing information – *i.e.*, having to use less accurate data and/or to pay inflated prices for accurate data – it has been able to remain competitive with the ILECs because of its innovative offerings, such as national directory assistance and free call completion, and superior levels of performance by its operators.[5] The ILECs, however, are using their preferred position to match INFONXX in the marketplace, while steadfastly refusing to provide INFONXX with nondiscriminatory access to

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Some of the DA innovations introduced by INFONXX and other independent DA providers, and now widely copied by other DA providers, are described below.

[5] INFONXX's innovations have been recognized widely in the telecommunications industry. For example, INFONXX's personal rolodex service received the MOBY award at the Go Mobile Conference for most innovative mobile application in the telecommunications category.

directory listing information.[6] As a result, consumers lose the benefit of price competition and may receive incorrect information due to the imperfect databases used by independent DA providers. Although two states have moved to recognize INFONXX's right to access to ILECs' DA information at incremental cost-based rates,[7] the ILECs have made every effort to delay the implementation of these orders. Consequently, federal action clearly is needed to promote the competition that independent DA providers are beginning to bring to the directory assistance marketplace.

DISCUSSION

The Commission has ample authority under the Communications Act of 1934 (Act), as amended by the Telecommunications Act of 1996 (1996 Act), to afford competitive DA

[6]The ILECs have always enjoyed an unfair advantage due to their monopoly position in the local exchange. In particular, the ILECs have leveraged their local monopoly into the following competitive advantages in the DA market: (a) free, perfect data, which reduces call processing time (operators only have to look in one database), labor costs and wrong numbers; (b) no marginal telecom infrastructure or billing costs to provide or bill for the service; and (c) a higher volume that enables them to achieve greater utilization of operator's time and thus lower labor costs. These advantages translate into concrete economic terms: the average ILEC call processing time is 18 seconds, as compared to 35 second for competitive providers. In an industry where labor costs account for 75% of incremental cost, that is significant. This advantage, coupled with the telecom infrastructure advantage and access to cheap data, adds up to an ILEC cost advantage of approximately 60% per call. (This information is set forth in greater detail in INFONXX's *ex parte* presentation contained in a letter from Gerard J. Waldron to Ms. Magalie Roman Salas, CC Docket Nos. 96-115, 96-221 (March 18, 1999), which is incorporated herein by reference.)

[7] *See* Order Regarding Directory Assistance Database Issues, Case 94-C-0095, 187 P.U.R.4th 345, 347 (N.Y.P.S.C. July 22, 1998) ("Offering directory database information on an equal basis to all telephone service providers and other companies, to be used for providing directory assistance or publishing a directory, will promote competition and help to level the playing field for producing directories and providing DA, thereby promoting better service at just and reasonable rates."); Order Instituting an Investigation on the Commission's Own Motion Into Competition for Local Exchange Service, R. 95-04-043 (Cal. PUC Jan. 24, 1997) ("Independent directory publishers should be provided with the same updated information for published residential addresses on the same terms and conditions as the information to the LEC directory affiliates.").

providers access to LECs' directory information at cost-based prices. INFONXX urges the Commission to exercise this authority to assure the continued growth of competition in the marketplace for directory assistance services.

I. THE COMMISSION SHOULD GRANT COMPETITIVE DIRECTORY ASSISTANCE PROVIDERS NONDISCRIMINATORY ACCESS TO DIRECTORY LISTING INFORMATION UNDER SECTION 251(b)(3).

The *Notice* seeks comment on the extent to which LECs should be required to provide directory listing information to independent DA providers that disseminate directory information orally through live operators. Specifically, the Commission asks whether LECs should be required to provide competitive DA providers with "nondiscriminatory access to . . . directory assistance" under Section 251(b)(3) of the Act.[8] For the reasons outlined below, INFONXX urges the Commission to require LECs to provide competitive DA providers with nondiscriminatory access to directory assistance information in accordance with the provisions of Section 251(b)(3).

A. The Directory Assistance Provisions Of Section 251(b)(3) Apply To Competitive Directory Assistance Providers.

Section 251(b)(3) requires local exchange carriers to provide "nondiscriminatory access to . . . directory assistance" to "competing providers of telephone exchange service and telephone toll service." 47 U.S.C. § 251(b)(3). The *Notice* seeks comment on whether DA providers unaffiliated with a LEC or interexchange carrier (IXC) are entitled to the protections of this section.[9] INFONXX urges the Commission to conclude that DA providers are entitled to

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[8] Notice of Proposed Rulemaking, *In re Provision of Directory Listing Information Under the Telecommunications Act of 1934, As Amended*, CC Docket No. 99-273, FCC 99-227, ¶ 184.

[9] *Notice*, ¶ 184. Given that some LECs simply refuse to consider the possibility that a DA provider could be a carrier under Section 251(b)(3), even when it offers call completion service,

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access under Section 251(b)(3) when they: (1) offer "call completion" service, which should be considered a telephone exchange or telephone toll service; and/or (2) serve as the agents of telephone exchange or toll service providers. The Commission should rule expressly and affirmatively on *both* the "call completion" basis and the agency basis because, in the experience of INFONXX and others in the market, the ILECs have put up roadblocks to every request for SLI from independent DA providers. Absent Commission action on *both* theories, therefore, the public will likely be deprived of at least some of the lower prices and better service that competition can bring.

1. Directory Assistance Providers That Offer Call Completion Service Are Providers of "Telephone Exchange Service" And "Telephone Toll Service."

The *Notice* seeks comment on whether a DA provider is a "provider of telephone exchange or telephone toll service" when it offers "call completion" services.[10] The clear precedent set forth in the Commission's recent *U S WEST Forbearance Order*, Commission holdings on "adjunct-to-basic" service, and an analysis of the possible call handling scenarios together establish that call completion by a competitive DA provider constitutes a telephone toll service or telephone exchange service.

The Communications Act defines "telephone exchange service" as

> (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided

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(continued . . .)
INFONXX believes that it is particularly important that the Commission, on a prospective basis, clarify this issue in this proceeding.

[10] *Notice*, ¶ 185.

> through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. § 153(47). The Act defines "telephone toll service" as

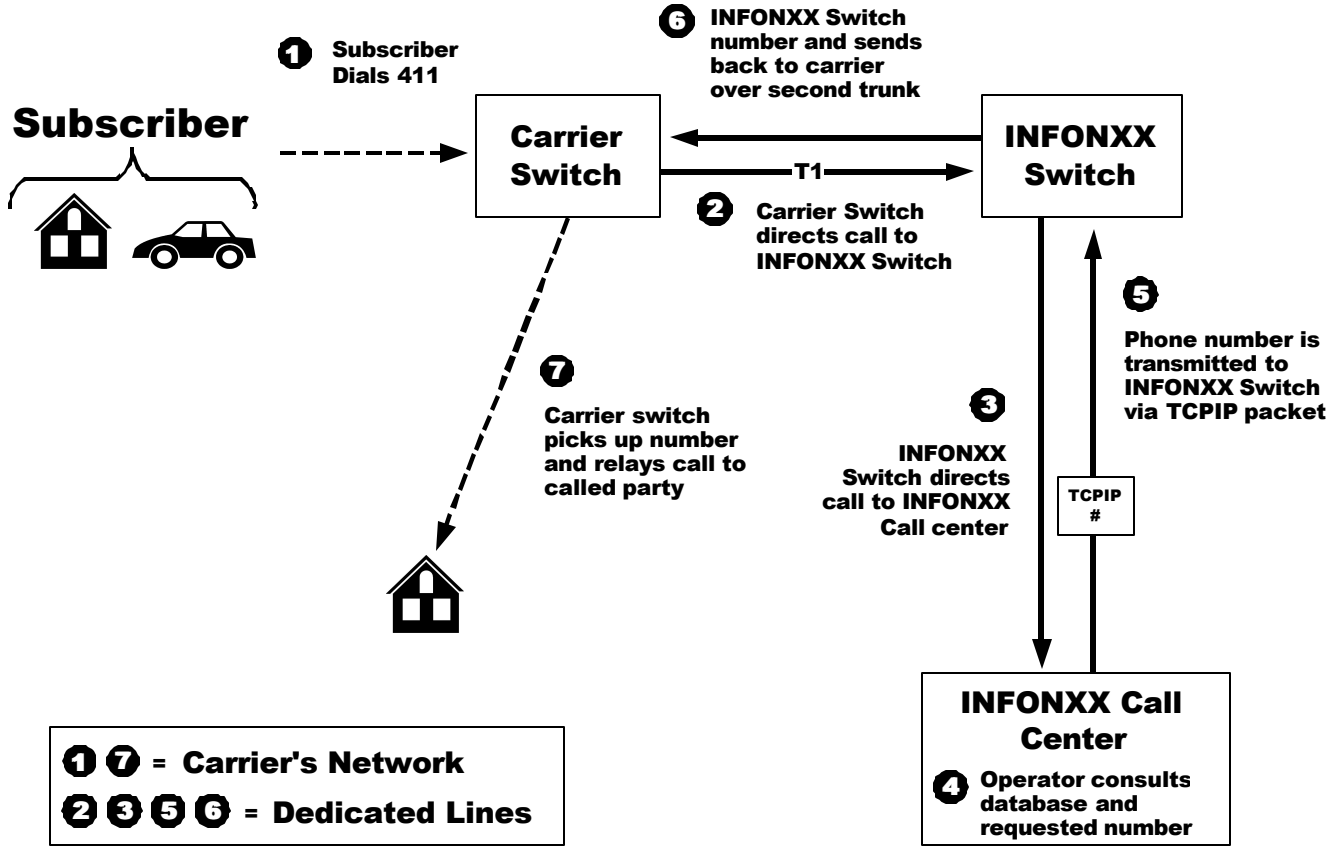
> telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

Id. § 153(48). Telephone service generally encompasses the "transmission between points specified by the user, of information of the user's choosing, without change in the form or content of the information sent and received." *Id.* § 153(43) (defining "telecommunications"). As described below, certain call completion services potentially offered by competitive DA providers could fall within these definitions. If a DA provider offers such services, it should be entitled to the protections of Section 251(b)(3).

a) Certain call completion services provided by competitive DA providers could constitute "adjunct-to-basic" or "telephone toll service."

In a typical DA call completion scenario, a subscriber's directory assistance call is first routed through a local carrier's switch to a DA provider's switch and then to its call center. The call center operator looks up the name and corresponding telephone number specified by the subscriber (who has subscribed either to the DA service directly or to the carrier to whom the DA provider provides service). At the express direction of the subscriber, the call center operator then sends the number to a switch or other transmission equipment. The transmission equipment then dials the number and transmits the call and numbering information back to the carrier's switch for delivery through the local exchange to the called party. *See* Fig. 1.

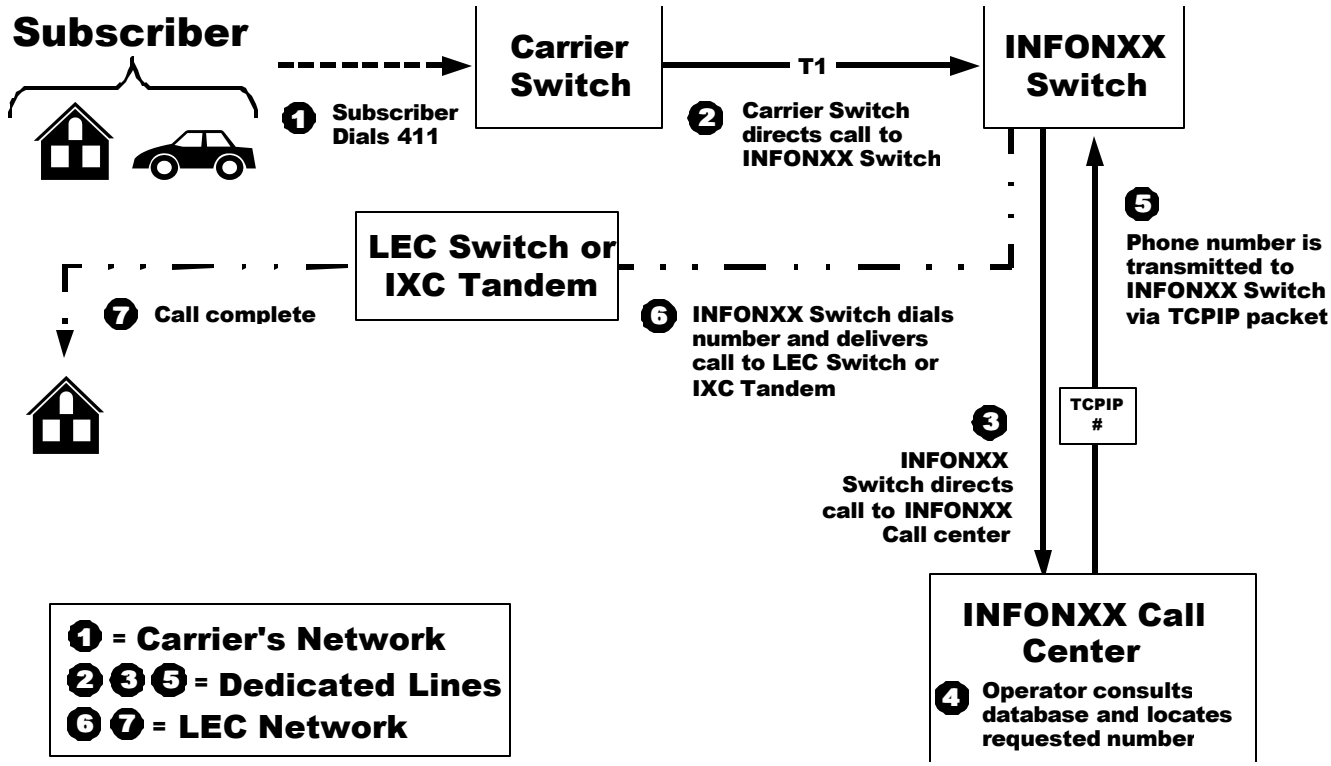
FIGURE 1



In some cases, the DA provider is more directly involved in the switching and routing of the call. In those circumstances, the DA provider's switch dials the number and, using dedicated lines purchased from the LEC, delivers the call directly to the appropriate ILEC or CLEC switch or to the interexchange tandem. *See* Fig. 2. The delivery of a call between the DA provider's switch and the competing carrier's or LEC's switch may take place within the same exchange or between exchanges. The lines over which the call is delivered by the DA provider ordinarily are purchased from the LEC at retail prices. However, upon a ruling by the Commission that call completion by a competitive DA provider constitutes a telephone exchange or telephone toll service, INFONXX would be entitled – and intends – to interconnect directly

with the LECs in the territories it serves. Accordingly, INFONXX would be entitled under Section 251 to purchase unbundled network elements – including loops and transport – for the purpose of completing directory assistance calls.

FIGURE 2



b) Commission precedent establishes that, at a minimum, the second configuration constitutes a telephone exchange or telephone toll service.

In the *U S WEST Forbearance Order*, the Commission, faced with a description of a LEC service similar to that described above, ruled that the provision of directory assistance was a "telecommunications service" that crossed from one exchange to another (indeed, in that case, the transmission crossed LATA boundaries), and thus was a telephone toll/interLATA

service.[11] The Commission reasoned that because the directory assistance inquiry initiated by a consumer dialing 411 or 1-411 triggered a transmission across telephone exchanges (and LATA boundaries), the provision of such a service constituted an interLATA service.[12]

In response to a petition for clarification by Ameritech, the Commission also reiterated its position that "traditional directory assistance services," generally defined as "operator provision of local telephone numbers" by a basic local exchange provider, are adjunct-to-basic services subject to regulation pursuant to Title II.[13] The Commission emphasized that the test for distinguishing enhanced from adjunct-to-basic service is whether the service facilitates the use of the basic network, not whether the service is local or national in nature.[14]

Applying these recent Commission decisions to the service described above, it is clear that, at minimum, a DA provider's call completion service involves the provision of "telecommunications" in the telephone exchange and telephone toll contexts. The DA provider's switch dials a requested number and delivers the call (the "information of the user's choosing") to the destination determined by the user. The service is provided through a system of switches

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[11] *See* Memorandum Opinion and Order, *In re Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of Directory Assistance, Petition of U S WEST Communications, Inc. for Forbearance*, CC Docket No. 97-172, FCC 99-133, ¶¶ 8-9, 14-15 (released Sept. 27, 1999) (*U S WEST Forbearance Order*) (describing U S West service); *see id.* ¶¶ 18-20 (ruling that service was "telecommunication" that crossed LATA boundaries).

[12] For purposes of this proceeding, the definitions of "telephone toll service," 47 U.S.C. § 153(47), and "interLATA service," 47 U.S.C. § 153(21), can be used interchangeably to the extent that they both refer to long distance telecommunications.

[13] *See U S WEST Forbearance Order,* ¶¶ 60-61; *see also* First Report and Order and Further Notice of Proposed Rulemaking, *The Use of N11 Codes and Other Abbreviated Dialing Arrangements,* CC Docket No. 92-105, 12 FCC Rcd. 5572, 5600 n.170 (1997) ("[B]y 'traditional' directory assistance we refer to operator provision of local telephone numbers. The Commission has determined that traditional directory assistance services are 'adjunct' to basic services and are regulated pursuant to Title II of the Communications Act.").

[14] *U S WEST Forbearance Order*, ¶ 61.

and other equipment that enables the caller to originate and terminate a telecommunications service, *i.e.,* the subscriber is able to call a single directory assistance number *and* be connected to the called party without hanging up and making a separate call through the local exchange network. In some cases, completion of the call occurs between two exchanges and a "separate charge" is incurred.[15]

It is equally clear that call completion service, to the extent that it consists of "traditional directory assistance services" along with call termination through a local exchange network, is an adjunct-to-basic service subject to Title II regulation. Thus, a DA provider offering call completion service is a provider of telephone exchange or telephone toll service, which entitles it to the access mandated by Section 251(b)(3).

The Commission should not distinguish a competitive DA provider in this position from other telephone exchange or telephone toll service providers covered under Section 251(b)(3), but should afford DA providers *all* of the protections of Section 251(b)(3) and the obligations elsewhere in the Act. Thus, LECs should be required to provide competitive DA providers with access to directory assistance databases at cost-based prices, and at the same terms and conditions as they provide it to themselves.[16]

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[15] Although INFONXX generally does not charge for call completion, the costs of transmitting a call between two exchanges are to some extent reflected in the price the consumer pays for the DA service.

[16] Such access must include the names and addresses of subscribers with unlisted or unpublished numbers whenever the LEC's operators have access to such information. *See* Second Order on Reconsideration of the Second Report and Order, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-227, ¶ 167 (released Sept. 9, 1999).

2. Under Section 217 Of The Act And Established Practice, Competitive Directory Assistance Providers Who Are Agents Of Carriers Should Have Access To Directory Assistance Information.

In the *Notice*, the Commission recognized that "[i]nterexchange carriers and competitive LECs . . . may not have the economies of scale to construct and maintain a directory assistance platform of their own," much less to provide "features and service enhancements such as call completion or reverse directory assistance."[17] INFONXX agrees with this observation and has built its business on that premise, creating an independent DA service to which these carriers can turn. In this capacity, INFONXX and other independent DA providers now "play an increasingly important role in ensuring that consumers receive the benefits of competition in all telecommunications-related services."[18] Accordingly, the Commission recognized in its *UNE Decision* that independent DA providers have played and will continue to play a critical role in assuring the competitive availability of directory assistance services from sources other than ILECs. But to continue to fulfill this function, independent DA providers must have access to SLI at cost-based prices pursuant to Section 251. Otherwise, the only providers of DA services will be the major CLECs/IXCs such as AT&T and MCI WorldCom.

Acknowledging the relationship between carriers (both CLECs and wireless) and independent DA providers, the *Notice* asks whether an independent DA provider can in some circumstances "be under an agency relationship with a carrier principal."[19] Where such an agency relationship exists, the *Notice* seeks comment on whether an independent DA provider should be entitled to nondiscriminatory access to DA under Section 251(b)(3) as the agent of a

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[17] *Notice*, ¶ 183.

[18] *Id.*

[19] *Notice*, ¶ 184.

carrier covered by that section.[20] Based on the provisions of the Act and the well-established principles of agency law, INFONXX urges the Commission to conclude that DA providers that provide DA service on behalf of a telephone exchange and toll service provider are agents of the carrier and, as such, are entitled to nondiscriminatory access to directory assistance information under Section 251(b)(3).

a) Competitive directory assistance providers act as the agents of telephone exchange and telephone toll service providers and should be entitled to assert the nondiscriminatory access right of their principals.

For the following reasons, the Commission should conclude that competitive directory assistance providers are agents of carriers and are entitled to gain access to subscriber list information at cost-based prices.

First, traditional agency law supports a conclusion that competitive DA providers are agents of carriers. According to the *Restatement (Second) of Agency*, "[a]gency is the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."[21] Although agency relationships often arise in the employment context, an independent contractor such as INFONXX may also be an agent.[22] Agency status for an independent contractor turns on an examination of whether the principal exercises sufficient control over the

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[20] *Id.*

[21] *See* Restatement (Second) of Agency § 1(1) (1958) (*Restatement*).

[22] *See Restatement* § 2(3); *see also Schleit v. Warren*, 693 F. Supp. 416, 420 (E.D. Va. 1988) ("A party may act simultaneously as an agent and independent contractor in the performance of duties for a principal; this seminal proposition underlies the court's conclusion that a process server acts as an agent in the sense that he is authorized to serve process on behalf of the attorney, yet the attorney retains little control over the manner in which process is served.").

contractor, without actually controlling the contractor's physical conduct, to give rise to an agency relationship.[23]

When a competitive telecommunications carrier contracts for DA services from an independent provider such as INFONXX, the independent DA provider clearly furnishes its services on the carrier's behalf. A wireless carrier or CLEC that contracts with an independent DA provider programs its switches to direct all DA queries to the DA provider's switch or call center. When the carrier's subscriber dials the appropriate DA number (usually 411 or 1-411), her call automatically goes to the independent DA provider. The DA provider generally brands the call for the carrier, and the subscriber perceives that the carrier itself is providing the DA service.

Moreover, the carrier ordinarily exerts a great deal of control over how DA services are delivered to the carrier's customers. For example, INFONXX's agreements with carriers specify nearly everything except how INFONXX's operators physically look up telephone numbers. The agreements control how INFONXX's and carriers' systems interconnect, how calls are custom-branded for each carrier, what carrier-specific chimes or messages are played during a call, what features are offered to which customers, and how numbers are read to customers (by human or by machine). The agreements also contain performance benchmarks such as how quickly calls must be answered and what is an acceptable average response time. The agreements even establish protocols for dealing with customer

[23] *See Restatement* § 14N ("One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor."); *Restatement* § 14N cmt. a (Although "[c]olloquial use of the term excludes independent contractor from the category of agent," there is an agency if the contractor acts for the benefit of another and subject to his control.); *McFarlane v. Esquire Magazine*, 74 F.3d

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complaints. Thus, carriers exert significant control over how INFONXX performs the DA service it provides to the carriers' subscribers, although they do not actually control its operators' physical conduct. This places INFONXX squarely within the agent/independent contractor paradigm.[24]

Second, many (if not all) carriers that contract with an independent DA provider will provide a "letter of agency" expressly declaring that the DA company is the carrier's agent for the purpose of obtaining SLI under Section 251 and providing DA services. Such a letter should be sufficient (but not necessary) to establish the *bona fides* of a competitive DA provider as a carrier's agent. INFONXX has already obtained one such letter, but was refused SLI by an ILEC because the ILEC refused to recognize that agents are entitled to SLI under Section 251.

Third, as the *Notice* correctly observes, Section 217 of the Act compels recognition of carrier agents in construing the Act.[25] Section 217 states:

> In construing and enforcing the provisions of this Act, the act . . . of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act . . . of such carrier or user as well as that of the person.

(continued . . .)
1296, 1303 (D.C. Cir. 1996) ("[E]stablishment of the principal-agent relationship as a threshold matter is based largely upon control of one party by the other.").

[24] *See, e.g.*, *State Police Ass'n v. IRS*, 125 F.3d 1, 7 (1st Cir. 1997) (telemarketing fundraising firm was agent of police association when association "retained very tight control over the method and manner of solicitation"); *Dearborn v. Mar Ship Operations, Inc.*, 113 F.3d 995, 998-99 (9th Cir. 1997) (ship charterer was agent of U.S. government when parties' agreement contemplated "significant overall control and direction" by government; provisions giving charterer operational control were not inconsistent with agency).

[25] *Notice*, ¶ 184.

47 U.S.C. § 217. Section 217's requirement that the acts of a carrier's agent be treated as the acts of the carrier for purposes of construing and enforcing the Act is not limited to assessing liability against a carrier for the acts or omissions of its agent; it can also encompass the agent's right to exercise the rights and obligations of the carrier principal. In *In re Communique Telecommunications, Inc. d/b/a LOGICALL*, the Common Carrier Bureau found that the National Exchange Carrier Association ("NECA"), as the agent of common carriers, could develop tariffs and bill and collect charges under them, even though the Act expressly provides for tariff filing only by common carriers.[26] The Bureau rejected the petitioner's argument that Section 217 concerned only carrier liability and thus precluded NECA from exercising directly the rights of the carriers it represented.[27] The *Restatement (Second) of Agency* likewise recognizes that an agent may have the authority to assert directly the rights and privileges of its principal.[28]

Accordingly, the Commission, in construing Section 251(b)(3), should deem the act of a competitive DA provider requesting access to a LEC's DA database (to provide accurate DA service to the carrier's subscribers) to be the act of the carrier whose subscribers the DA provider will be serving. The carrier clearly has the right to take such an action on its own behalf under Section 251(b)(3). Thus, the DA provider, the carrier's agent, similarly should be entitled to enter into an interconnection or similar agreement giving the DA provider nondiscriminatory

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[26] Declaratory Ruling and Order, *In re Communique Telecommunications, Inc. d/b/a LOGICALL*, 10 FCC Rcd 10399, 10403 (1995).

[27] *Id.* at 10401, 10403.

[28] *See Restatement* § 345 cmt. a ("[A]n agent who has no privilege of his own to enter a particular tract of land can properly do so upon his principal's business if his principal is privileged to have an agent so enter.").

access to DA under Section 251(b)(3).[29] The Commission should also make clear that a carrier can request DA information under Section 251(b)(3) and transfer the information to a company such as INFONXX that would use the information to provide DA service on the carrier's behalf.[30]

This result is consistent with Congress's intent in enacting Section 251(b)(3). Congress intended that competitive carriers would have access to directory assistance information so that they could provide the whole range of "telephone service," including DA, to their customers. There is no evidence that Congress intended to limit the manner in which such carriers could provide DA services, including through an independent third party. By affording carriers' agents access to SLI in accordance with Section 251(b)(3), the Commission would effectuate Congress's intent and ensure that independent DA providers can provide DA service to carriers' subscribers using information that is as accurate as the information carriers themselves are entitled to obtain under Section 251(b)(3).

b) Competitive directory assistance providers should not be restricted in the use of directory assistance information that they obtain as the agents of telephone exchange and toll service providers.

The *Notice* asks whether a competitive DA provider should be permitted to use information obtained in its capacity as a carrier's agent to provide DA to persons other than the carrier's customers.[31] INFONXX urges the Commission to permit DA providers unlimited use of the information they obtain as carriers' agents. Restricting a DA provider's use of information

[29] The anticipated agreement would give competitive DA providers access only to the DA database, not other ILEC elements.

[30] In either event, the Commission would recognize the obvious fact that telecom carriers outsource important functions, which increases efficiency and promotes the public interest.

[31] *Notice*, ¶184.

obtained as a carrier's agent to that carrier's customers would impose a heavy administrative burden, add substantially to labor costs, and could interfere with the provision of cost-efficient and enhanced services.

If the Commission prohibited a DA provider from dispensing information obtained as the agent of a carrier to anyone other than that carrier's customers, the DA provider would have to take extraordinary and burdensome steps to ensure meaningful compliance with the prohibition. For example, the provider would have to establish separate databases for SLI obtained on behalf of each carrier to whom the DA provider provides service. An alternative system under which the DA provider combined SLI into a single database and simply "marked" listings according to the customers to whom they could be provided would be too dependent on individual operator behavior to ensure compliance. But establishing separate databases would impose huge administrative burdens on the DA provider, including the maintenance of separate computer hardware and software and the establishment of separate database administration processes for each database. The use of separate databases also would significantly decrease service efficiency, virtually eliminating the economies of scale that make independent DA service competitive. Moreover, database segregation would lead to slower call-response times and less accurate responses. Thus, the ability of independent DA providers to compete in the market for DA services would be severely limited by any restriction on the use of SLI obtained as a carrier's agent, which would undermine a central goal of making the information available to DA providers in the first place.

Additionally, where an independent DA provider offers DA service to more than one carrier in a market, as INFONXX does, it would be wasteful and inefficient to force the DA provider, as each carrier's agent, to pay multiple times for access to the same information. One

payment would provide the ILEC what it is entitled to under Section 251: its forward-looking costs in compiling and managing the SLI database and making the requested information available to the requesting party. The ILECs will probably complain that this approach would be "unfair" it would not enable the ILECs to recover the "value" of their SLI from all the carriers that will make use of it, but this argument misses the point. As the *Notice* recognized, Section 251(b)(3) itself does not place limits on the use of directory assistance data.[32] The Commission should not at this point add limitations that would frustrate the goal of fostering competition in the provision of directory assistance service.

Perhaps most significantly, it would be inappropriate for the Commission to restrict the use of DA information by a carrier's agent when the Commission does not restrict the use of that information by carriers themselves. Interexchange carriers such as AT&T and MCI WorldCom obtain directory assistance information from LECs as providers of telephone toll service and use this DA information to compile national directory assistance databases which they use to provide competitive national directory assistance service. It would be unfair and anti-competitive to prevent independent DA providers from using the information they obtain as agents under the same statutory provision to provide a similar national directory assistance service.

B. Sections 201(b) And 202(a) Further Support A Rule Prohibiting Local Exchange Carriers From Denying Competitive Directory Assistance Providers Nondiscriminatory Access To Directory Assistance Information.

The *Notice* also raises the question of whether competitive DA providers may be entitled to the protections of Section 251(b)(3) pursuant to the nondiscrimination and "just and

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[32] *Notice*, ¶ 186.

reasonable practice" requirements of Sections 201(b) and 202(a).[33] In considering this issue, the Commission should keep in mind that the scope of authority contained in Sections 201 and 202 is broad. In fact, for the two decades prior to passage of the 1996 Act, the Commission's groundbreaking decision promoting local and long distance telephone competition, from equal access to Open Network Architecture to the early interconnection orders, were all taken, to some extent, under Sections 201 and 202.[34] Thus, these Sections give the Commission ample authority to act.

Section 201(b) provides that "[a]ll charges, practices, classifications and regulations for or in connection with [interstate or foreign communication by wire or radio], shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful." 47 U.S.C. § 201(b). Section 202(a) makes it "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device." 47 U.S.C. § 202(a). This broad grant of authority empowers the Commission to rule that all competitive DA providers (not just those providing call completion or acting as agents of carriers) are entitled to

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[33] *Notice*, ¶ 190.

[34] *See, e.g.*, Memorandum Opinion and Order on Reconsideration, *In re Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, 2 FCC Rcd 3035, 3051 (1987) (explaining that Commission had jurisdiction under Sections 201 to 205 to control discrimination in the provision of ONA elements to competing providers of advanced services); Final Decision and Order, *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, 28 F.C.C. 2d 267, 300 (1970) (setting forth authority, including Sections 201 and 202, for Commission action in the *Computer Inquiry* proceedings).

nondiscriminatory access to DA information in accordance with the provisions of Section 251(b)(3).

1. Discrimination In The Provision Of Directory Assistance Information Is Unjust And Unreasonable Discrimination Under Section 202(a) And An Unjust And Unreasonable Practice Under Section 201(b).

As the *Notice* acknowledges, the Commission already has determined that Sections 201(b) and 202(a) apply to the "charges" and "practices" of LECs in the provision of nondiscriminatory access to information and services required under Section 251(b)(3).[35] In the *Local Competition Second Report and Order*, the Commission concluded that charging different fees to different providers for access to telephone numbers constituted discriminatory access in violation of Section 251(b)(3) and constituted unreasonable discrimination under Section 202(a) and an "unjust practice" and "unjust charge" under Section 201(b).[36] The Commission explicitly extended the prohibition against such discriminatory pricing to paging carriers, despite the fact that paging carriers are not telephone exchange or telephone toll service providers covered by Section 251(b)(3). The Commission concluded that the nondiscrimination requirement in Section 202(a) supported the extension of Section 251(b)(3)'s requirement of nondiscriminatory access to telephone numbers to paging carriers. The Commission reasoned that "[p]aging carriers are increasingly competing with other CMRS providers [covered by Section 251(b)(3)],

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[35] *Notice*, ¶ 189.

[36] Second Report and Order and Memorandum Opinion and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 19392, 19537-38 (1996) ("*Local Competition Second Report and Order*"). In addition to requiring nondiscriminatory access to DA, Section 251(b)(3) also requires LECs to provide "nondiscriminatory access to telephone numbers."

and they would be at an unfair competitive disadvantage if they alone could be charged discriminatory [telephone number] activation fees."[37]

As with discrimination in the provision and pricing of numbering resources, the LECs' practice of affording different access and charging different prices for access to directory assistance information is an "unjust practice" and "unjust charge" under Section 201(b) and unreasonable discrimination under Section 202(a). *First,* charges and practices relating to the provision of directory assistance information are charges and practices "in connection with [interstate or foreign communication by wire]" under Section 201(b). The Commission recently recognized the importance of directory assistance service to the provision of basic local exchange service (an essential component of all interstate or foreign telecommunications). As noted above, the Commission found in the *U S WEST Forbearance Order* that "[b]ecause the purpose served by directory assistance, whether inclusive of national listings or not, is to facilitate the use of the basic network, . . . nonlocal directory assistance service [along with traditional directory assistance service] is properly classified as adjunct-to-basic."[38] Thus, directory assistance service clearly is provided "in connection with" communications services. Accordingly, charges and practices related to the compilation of directory assistance information and the sharing of that information with alternative DA providers, who likewise seek to provide DA services to facilitate the use of the basic local network, are also made "in connection with" communications services. When charges and practices related to directory assistance information are designed to parlay the LECs' monopoly over accurate DA information into a

[37] *Id.* at 19538.

[38] *U S WEST Forbearance Order,* ¶ 61.

monopoly over the provision of DA services, they clearly are "unjust" and "unreasonable" in violation of Section 201(b) and Congressional intent.

Second, discrimination in the access provided and the prices charged to different kinds of DA providers is "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service." As noted above, directory assistance service plays an important role in enabling consumers to make use of telecommunications networks, and accordingly is an essential component of "communication service." Moreover, all types of directory assistance that enable subscribers to make use of the telephone network are forms of a "like communication service." Again, when LECs charge competitive providers different prices and afford different access to directory assistance information in an effort to maintain their monopoly over the provision of this "like communication service," they engage in "unjust" and "unreasonable" discrimination "in connection with" DA service.

Finally, the rationale the Commission applied to extend the protections of Section 251(b)(3) to paging carriers seeking access to telephone number resources is equally applicable to competitive DA providers seeking access to directory assistance information. As with telephone number activation, charging discriminatory prices (or imposing different terms and conditions of access) for directory assistance information among different competing DA providers would unjustly and unreasonably discriminate among different classes of persons in the provision of a single "communication service." Moreover, competitive DA providers like INFONXX increasingly are competing with local and long distance companies now providing DA services. Just as paging carriers would suffer without nondiscriminatory access to telephone numbers, so competitive DA providers are at an unfair competitive disadvantage when they are

charged higher prices for or denied access altogether to LECs' directory assistance information. INFONXX's experience in the marketplace strongly supports the *Notice's* tentative conclusion that "non-carrier directory assistance providers cannot compete without access to directory assistance *equal to* that provided to providers of telephone exchange service and telephone toll service pursuant to Section 251(b)(3)."[39] Denying competitive DA providers access to the information they need to compete would reduce overall competition in the DA market, frustrating Congress's goal of bringing competition to local telephone markets (including the DA market) traditionally controlled by monopoly LECs. Placing competitive DA providers at a competitive disadvantage to local and long distance carriers providing DA services also would harm consumers by hindering the ability of competitive DA providers to continue to bring innovations, such as free call completion and personal telephone list services, to the directory assistance market.[40] Accordingly, the Commission should prevent unjust and unreasonable discrimination between providers of a "like communication service" by requiring LECs to provide DA information to competitive DA providers at the same rates, terms, and conditions under which competing providers of telephone exchange and telephone toll service receive such information under Section 251(b)(3).[41]

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[39] *Notice*, ¶ 190 (emphasis added).

[40] *See Local Competition Second Report and Order*, 11 FCC Rcd at 19460 ("[The Commission] agree[s] with MCI that 'by requiring the exchange of directory listings, the Commission will foster competition in the directory services market and foster new and enhanced services in the voice and electronic directory services market.'").

[41] There should be no doubt that the Commission has the jurisdiction to apply Sections 201(b) and 202(a) to impose obligations on LECs with respect to the provision of directory assistance information to competitive DA providers. The Supreme Court has held that the Commission's jurisdiction extends beyond its express responsibilities under the Act to those areas "reasonably ancillary to the effective performance of the Commission's various responsibilities." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *see also* 47 U.S.C. § 152(a). Under

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2. The Section 251(b)(3) Protections Extended To Competitive Directory Assistance Providers Must Include Nondiscriminatory Pricing.

In applying Sections 201(b) and 202(a) to extend the protections of Section 251(b)(3) to competitive DA providers, the Commission should ensure that the directory assistance pricing applicable to telephone exchange and telephone toll providers covered expressly under Section 251(b)(3) applies to competitive DA providers. As discussed above, "non-carrier directory assistance providers cannot compete without access to directory assistance *equal to* that provided to providers of telephone exchange service and telephone toll service pursuant to Section 251(b)(3)."[42] As the Commission made clear in applying Section 251(b)(3)'s number access provisions to paging carriers in the *Local Competition Second Report and Order*, the price charged is an essential component of nondiscriminatory access. Charging different providers different fees for access to the same information is not nondiscriminatory access. Accordingly, the Commission should make clear that the prices to be charged competitive DA providers under Section 251(b)(3), as applied pursuant to Sections 201(b) and 202(a), are the incremental cost-based prices charged to other providers of DA services expressly covered by Section 251(b)(3).

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this principle, the D.C. Circuit Court has held that the Commission is entitled to considerable deference in determining how to exercise its ancillary jurisdiction over services related to those expressly regulated under Title II of the Act. *Computer & Comm. Industry Ass'n v. FCC*, 693 F.2d 198, 211 (D.C. Cir. 1982). Deference to the agency is particularly appropriate where the services at issue involve emerging technologies not expressly contemplated by Congress in enacting the relevant statutory provisions. *See id.* at 213-14.

[42] *Notice*, ¶ 190 (emphasis added).

II. DIRECTORY ASSISTANCE PROVIDERS ALSO SHOULD BE ENTITLED TO RECEIVE SUBSCRIBER LIST INFORMATION UNDER SECTION 222(e).

The *Notice* also seeks comment on whether those directory assistance providers that use live operators to publish directory listing information orally are engaged in "publishing directories in any format" and thus entitled to access to subscriber list information under Section 222(e) of the Act.[43] As INFONXX has demonstrated in previous filings,[44] the language of Section 222(e) and the underlying goals of the 1996 Act support the conclusion that the oral provision of directory assistance information constitutes the publication of "directories in any format" within the meaning of Section 222(e). Therefore, the Commission should rule in this proceeding that competitive DA providers are entitled to access to directory listing information under Section 222(e) as well as pursuant to Section 251(b)(3). However, to enable competitive DA providers to compete effectively in the market for oral directory services, the Commission should also conclude that competitive DA providers are entitled to SLI at prices comparable to those paid by telephone exchange and telephone toll service providers who gain access to directory information under Section 251(b)(3), rather than at the rates paid by publishers of print directories.

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[43] *Notice*, ¶ 180.

[44] *See, e.g.*, *Ex Parte Notice* of INFONXX, Inc., CC Docket No. 96-115 (June 28, 1999); *Ex parte* filing of INFONXX, Inc., CC Docket No. 96-115 (May 19, 1999); *Ex parte* filing of INFONXX, CC Docket No. 96-115 (April 30, 1999); *Ex parte* filing of INFONXX, CC Docket No. 96-115 (April 22, 1999); *Ex parte* filing of INFONXX, CC Docket No. 96-115 (Mar. 18, 1999); *Ex Parte Presentation* of INFONXX, Inc., CC Docket No. 96-115 (Feb. 18, 1999). To save repetition of the points made in these filings, we incorporate them here by reference.

a) Application of Section 222(e) to oral dissemination of directory information.

Section 222(e) requires a provider of telephone exchange service that gathers names, addresses, and telephone numbers of subscribers to provide such subscriber list information "on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format." 47 U.S.C. § 222(e). The conclusion that the statutory phrase "publishing directories *in any format*" encompasses the oral publication of directory information in response to a specific request is consistent with the statutory language, the understanding of the meaning of the term "publish" elsewhere in the Act and in common usage, and the pro-competitive policies underlying the Telecommunications Act of 1996.[45]

Section 222(e) on its face mandates a broad construction because it applies sweepingly to publication "in any format." Congress surely knows how to limit the scope of the term "publish," but instead it chose to formulate the statute to include all possible directory formats. This refutes any suggestion that Section 222(e) was intended to apply only to print or other visual directory compilations.[46]

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[45] *See* Separate Statement of Commissioner Harold Furchtgott-Roth, Dissenting in Part, *In re Provision of Directory Listing Information Under the Telecommunications Act of 1934, As Amended*, CC Docket No. 99-273, at 3-4 ("*Furchtgott-Roth Separate Statement*").

[46] A conclusion that Section 222(e) applies only to visual directories would be inconsistent with Congress's efforts elsewhere in the 1996 Act to ensure that communication services are broadly accessible to persons with disabilities. *See* 47 U.S.C. § 255; *see also* Report and Order and Further Notice of Inquiry, *In re Implementation of Section 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, FCC 99-181 (released Sept. 29, 1999). Because persons with visual and other disabilities may be unable to make use of print or other visual directories, it would be surprising for Congress to restrict the application of a

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Further, the term "publish," both in the legal context and in everyday usage, is widely understood to encompass oral publication. For example, the principles of defamation law contemplate that a person can "publish" information through media other than written text.[47] Similarly, the standard dictionary definition of the word "publish" speaks to making information known; it does not address the method of disclosure.[48] Thus, the verb "to publish" has been defined to mean "to make publicly known; announce, proclaim, divulge or promulgate,"[49] to make information "generally known" or "generally accessible for acceptance or use,"[50] or "to utter" information.[51] Thus, INFONXX agrees with Commissioner Furchtgott-Roth that "an operator orally 'making known' subscriber list information to a requesting party over the telephone or an entity that 'discloses' this information on an Internet site would clearly be engaging in activity that the dictionary would call 'publishing.'"[52]

(continued . . .)
statutory provision designed to promote competition in the telephone directory market to those providing only directories that are not fully accessible to persons with disabilities.

[47] *See, e.g.*, *Gertz v. Welch*, 418 U.S. 323, 332 (1974) ("The principal issue in this case is whether a newspaper *or broadcaster* that published defamatory falsehoods about an individual . . . .") (emphasis added).

[48] Where Congress has not defined a statutory term, it is appropriate to consult dictionary definitions in an effort to give the word its common, everyday meaning. *See, e.g.*, *Pioneer Investment Servs. Co. v. Brunswick Assoc. Ltd.. Partnership*, 507 U.S. 380, 388 (1993) (relying on Webster's Dictionary definition after concluding that "[c]ourts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning'") (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); *MCI Telecommunications Corp. v. AT&T Corp.*, 512 U.S. 218, 225-26 (1994) (analyzing numerous dictionary definitions to define a statutory term).

[49] *Webster's New World Dictionary* 1087 (3d coll. ed. 1988).

[50] 2 *Compact Edition of the Oxford Dictionary* 1561-62 (1971).

[51] *Black's Law Dictionary* 1233 (6th ed. 1990).

[52] *See Furchtgott-Roth Separate Statement*, at 3-4.

Finally, the pro-competitive goals of the 1996 Act mandate a broad reading of the phrase "publishing directories in any format." As demonstrated in Sections 251(b)(3) and 222(e), Congress in enacting the 1996 Act clearly sought to promote competition in all communications markets traditionally dominated by monopoly LECs, including the market for the provision of directory information. Interpreting Section 222(e) broadly to cover all forms of directory publication (oral, written, or electronic) will best promote this important goal. Accordingly, the Commission should treat providers of both Internet directories – those published electronically, one name at a time, over the Internet – and oral directory services – published orally, one name at a time, over telephone lines – the same for purposes of Section 222(e).[53] In fact, the technologies used to deliver directory information are converging such that users today are able to access electronic directories from remote locations (for instance, from a Palm Pilot) and soon will be able to request and receive such information in audio form through voice recognition technology. The next generation of wireless telephones may well enable users to choose between an electronic directory and live operators for subscriber information (and the electronic directory may be able to receive and convey information in audio form). Thus, from a competitive perspective, regulatory policy should not favor one of these technologies over the other with respect to access to subscriber list information.

b) Pricing of subscriber list information provided to competitive directory assistance providers.

INFONXX urges the Commission to require the provision of SLI to "publishers" seeking to make the information available to the public through a variety of media, including

[53] Though the growth of Internet access is remarkable and widespread, there are still many households, especially low-income families, that lack access to the Internet. These information "have-nots" should not be deprived of low-cost, high-quality competitive DA services.

paper compilations, oral dissemination through a live operator or automated voice system, and electronic databases that offer per-query responses to inquiries made over the Internet. However, in applying the requirement that carriers provide SLI "under nondiscriminatory and reasonable rates, terms, and conditions," the Commission should recognize that what will constitute "nondiscriminatory and reasonable rates, terms, and conditions" may differ depending on the type of publisher. This is because market factors, including the market participants among whom a LEC's rates, terms and conditions for SLI may not discriminate, will differ depending on the market in which each type of publisher competes. For example, the costs (for compilation of information, periodic printing and marketing) and revenue (from advertisements) in the market for paper directories differ markedly from the costs (switches and other computer equipment, database maintenance, operator-staffed call centers) and revenue (per-call or flat rate charges paid by carriers or end-users) in the market for oral directory information services. Similarly, the competitive players in the markets differ dramatically. In the market for paper directories, the ILEC and other paper directory publishers that have obtained directory information under Section 222(e) are the competition. In the oral directory services market, ILECs, IXCs and other carriers that have obtained directory information under Section 251(b)(3), and other independent DA providers are the competition.

As the Commission recognized in the *Notice*, in the oral directory assistance market, independent DA providers "cannot compete without access to directory assistance equal to that provided to providers of telephone exchange service and telephone toll service pursuant to Section 251(b)(3)."[54] Therefore, for oral DA providers "nondiscriminatory and reasonable rates,

[54] *Notice*, ¶ 190.

terms and conditions" will be those under which directory assistance information is provided to competing carriers under Section 251(b)(3), not the presumptively reasonable rates the Commission determined apply to the provision of SLI to publishers of paper directories.[55]

III. LOCAL EXCHANGE CARRIERS PROVIDING NATIONAL DIRECTORY ASSISTANCE SERVICE SHOULD BE REQUIRED TO PROVIDE NONDISCRIMINATORY ACCESS TO ALL DIRECTORY ASSISTANCE DATA THEY USE IN THE PROVISION OF SUCH SERVICES.

The *Notice* further seeks comment on whether the Commission should require LECs offering nonlocal directory assistance service to provide nondiscriminatory access to their nonlocal DA information pursuant to Section 251(b)(3).[56] The Commission noted that it recently granted in part a petition of U S WEST Communications, Inc. (U S WEST) to provide national directory assistance services through an integrated entity, rather than through a separate affiliate as required under Section 272 of the Act. However, the Commission conditioned its grant of forbearance from Section 272 on U S WEST's providing its in-region DA information to unaffiliated entities at the same rates, terms and conditions it imputes to itself.[57] In this proceeding, the Commission asks whether it should impose a similar requirement, pursuant to

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[55] In the *Third Report and Order* on SLI, the Commission stated that the presumptive rates it established there with respect to the provision of SLI to publishers of print directories "will apply regardless of the format in which the publisher intends to publish the subscriber list information and regardless of the number of times the publisher intends to publish the directories." Third Report and Order, *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, FCC 99-227, ¶ 72 (released Sept. 9, 1999). INFONXX agrees that it makes sense not to distinguish in terms of pricing among different publishing formats within the same market (*i.e.*, print publishing), but urges the Commission to recognize, based on the reasons set forth above, that application of the presumptive rates for print directory publishers to publishers serving other directory markets would not effectuate the goal of ensuring that SLI is provided to publishers at "nondiscriminatory" rates, terms, and conditions.

[56] *Notice*, ¶ 193.

[57] *U S WEST Forbearance Order*, ¶¶ 33-41.

Section 251(b)(3), on all LECs providing nonlocal directory assistance service to their subscribers. INFONXX strongly supports the application of a requirement that all LECs provide competing DA providers with nondiscriminatory access to *all* of the directory assistance information their operators use in the provision of directory assistance services to their subscribers.

As discussed above, Section 251(b)(3) requires LECs to provide competing carriers with "nondiscriminatory access to . . . directory assistance." 47 U.S.C. § 251(b)(3). As the Commission recognized in the *Local Competition Second Report and Order*, the goal of this and other provisions in the 1996 Act is to ensure that "incumbent LECs provide competitors with access to the incumbent LECs' networks sufficient to create a competitively neutral playing field for new entrants."[58] Recently, LECs have begun to expand their provision of directory assistance services to include regional and sometimes national directory assistance.[59] Generally, a LEC's regional directory assistance information comes from a region-wide database compiled from the directory information the LEC has gathered as the provider of local exchange service. National directory information may come from other ILECs sharing directory information on a cooperative basis or from a nationwide database compiled by an independent party at prices that, for ILECs, may be below market because of some cooperative information-sharing arrangement.

As the geographic scope of LECs' directory assistance services has expanded, pursuant to the Bell companies' claim of authority under Section 271, the access that constitutes

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[58] *Notice*, ¶ 193.

[59] *Id.* (noting that Section 251(b)(3) does not expressly mention nonlocal listing information because LECs were not offering nonlocal directory assistance when the 1996 Act was enacted or when the *Local Competition Second Report and Order* was adopted).

"nondiscriminatory access" to directory assistance information also has changed. The Commission repeatedly has explained that "nondiscriminatory access" means access of the same quality a LEC affords itself.[60] Thus, the Commission concluded in the *Local Competition Second Order on Reconsideration* that when "a LEC, in the provision of directory assistance service to itself, allows its own directory assistance operators to see the names and addresses of subscribers with unlisted information, this information must also be made available to the requesting competitive LEC."[61] Similarly, where a LEC's DA operators have access to a comprehensive region-wide or nationwide database for the provision of DA services, competing DA providers must likewise have "nondiscriminatory access" to the information contained in that database at the same rates, terms and conditions as the LEC.[62]

[60] *See Local Competition Second Order on Reconsideration*, ¶ 128 ("We . . . affirm now[] that any standard that would allow a LEC to provide access to any competitor that is inferior to that enjoyed by the LEC itself is inconsistent with Congress' objective of establishing competition in all telecommunications markets.").

[61] *Id.* ¶ 167.

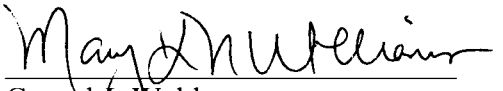
[62] It may turn out that Section 251(b)(3) access to a LEC's nationwide directory information may not be commercially appealing because the price paid by the LEC for out-of-region SLI may exceed the price paid by independent DA providers. However, absent a requirement of nondiscriminatory access under Section 251(b)(3), the ILECs could arrange among themselves to pay below-market rates for national directory information, which would prevent competing DA providers (whether other carriers or independent DA providers) from competitive effectively with the local incumbents as Congress intended.

CONCLUSION

In accordance with the foregoing, INFONXX urges the Commission swiftly to adopt the necessary rules to ensure that competitive directory assistance providers like INFONXX have access to LECs' directory information at nondiscriminatory prices no higher than those paid by other competing providers of directory assistance services or by the LECs themselves.

Respectfully submitted,

INFONXX, INC.



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